U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-D-M-S-, INC.

DATE: NOV. 13, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, which describes itself as a dental practice management services business, seeks to permanently employ the Beneficiary in the United States as a dentist. The Petitioner requests classification of the Beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The Director, Nebraska Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

Section 203(b)(2) of the Act provides for immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate." The regulation also provides that a "[a] United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." *Id.*

The Director denied the petition in a decision dated February 24, 2015. The Director found that evidence submitted by the Petitioner showed that the Petitioner would not be the Beneficiary's actual employer. The Director also determined that the Petitioner had not established the ability to pay the proffered wage as of the priority date.

The petitioner filed a timely appeal, along with a brief from counsel and supporting documentation. We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

I. EMPLOYER-EMPLOYEE STATUS

The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3[1] states:

[1] The regulatory scheme governing the foreign labor certification process contains certain safeguards to assure that

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

In this case, the evidence shows that the Petitioner uses Federal Employer Identification Number (FEIN) . The Beneficiary indicated on ETA Form 9089, Section K.a. that she had worked for the Petitioner since March 30, 2009; however, the accompanying resume reflects that she had worked for since March 2009. The Petitioner submitted paystubs and IRS Forms W-2 showing that the Beneficiary had been working for with FEIN Accompanying printouts from the Petitioner's website explain that the Petitioner "is solely a business service organization."

On December 17, 2014, the Director issued a request for evidence (RFE) and requested that the Petitioner resolve this discrepancy to establish which company would be the Beneficiary's actual employer. In response to the RFE, the Petitioner submitted a letter dated February 4, 2015, from its Chief Financial Officer. explained that is a wholly-owned subsidiary of [the Petitioner]."

The Director concluded that the Petitioner had not established that it intended to employ the Beneficiary and denied the petition on February 24, 2015. On appeal, the Petitioner asserts through counsel that was not an operating company but merely served as a conduit for funds from [the Petitioner] to the dentist." The Petitioner submits a document titled "Associate Dentist Employment Agreement" that names " as the Beneficiary's "Employer." It is noted that the document repeatedly refers to "Employer" and the Petitioner (referred to as as two separate and distinct entities.

The Petitioner also submits a new letter from dated April 16, 2015. explains that is "the sole shareholder of" initial assertion that was a "wholly-owned subsidiary" of the Petitioner, and this later statement that is "the sole shareholder" are contradictory.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and

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petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho,* 19 I&N Dec. 582 (BIA 1988).

The new letter from explains that is the owner of "the practice on and where [the Beneficiary] works now." The Petitioner submits a copy of its management agreement with The agreement describes the Petitioner as "a management company which among other things provides administrative, marketing, and business advice and support to entities engaged in the practice of dentistry." The agreement states that the Petitioner "shall employ all of the Center's staff, except for the Dentists, dental assistants and dental hygienists, if any." The management agreement repeatedly refers to and the Petitioner (referred to as as separate and distinct corporations, contradicting previous assertions that "is a wholly owned subsidiary of utilized solely for payroll purposes."

The evidence submitted shows that the Petitioner is a management company and that the Beneficiary will actually be employed by a separate and legally distinct company. The Petitioner has not established its intent to employ the Beneficiary and that it was authorized to file the instant petition. Consequently, the director's decision to deny the petition on this ground will be affirmed.

II. ABILITY TO PAY THE PROFFERED WAGE

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on February 13, 2014. The proffered wage as stated on the ETA Form 9089 is $95,000 per year.

On the petition, the Petitioner claimed to have been established in , to have a gross annual income of $64,105,874, and to currently employ 750 workers. According to the tax returns in the record, the Petitioner's fiscal year follows the calendar year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant

petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary any wages.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Haw. Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
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> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River St. Donuts, 558 F.3d at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang,* 719 F. Supp. at 537 (emphasis added).

The Petitioner's Form 10-K, Annual Report, demonstrates a net loss of $923,634 in 2014. Therefore, the Petitioner did not have sufficient net income to pay the $95,000 proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. On its Form 10-K, Annual Report, the Petitioner claimed current assets of $4,664,691 in 2014 and current liabilities of $6,988,564. Therefore, for 2014 the Petitioner did not have sufficient net current assets to pay the $95,000 proffered wage.

It is noted that the Petitioner submitted a letter dated February 4, 2015, from its Chief Financial Officer, [redacted] In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That regulation further provides: "In a case where the prospective United States employer

[2] Current assets consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. Current liabilities are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). Joel G. Siegel & Jae K. Shim, *Dictionary of Accounting Terms* 118 (3d ed., Barron's Educ. Series 2000).

employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added.) affirmed that the Petitioner "retains sufficient current funds to pay all salaries due to our 115 dentists on a consistent basis, including salary due to [the Beneficiary]." did not offer any explanation to reconcile that assertion with the fact that in 2014 the company's Annual Report shows net *losses* of $923,634 and *negative* net assets of $2,323,873.

Given the record as a whole, we find that USCIS need not exercise its discretion to accept the letter from Given the sheer size of the company's negative income and negative net current assets, we cannot rely on a letter as sufficient evidence to establish the ability to pay the Beneficiary.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Sonegawa,* 12 I&N Dec. at 614-15. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the Petitioner claims significant annual gross revenue and pays significant total annual wages to all employees. However, unlike the petitioner in *Sonegawa*, the current Petitioner has not established the historical growth of its business or its reputation within its industry, nor has it claimed the occurrence of any uncharacteristic business expenditures or losses during the years in question. The Petitioner did not submit evidence of any wages it paid to the Beneficiary, nor did it demonstrate its ability to pay the proffered wage by means of its net income or net current assets from the priority date or subsequently. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the Petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date onwards.

III. QUALIFYING EMPLOYMENT HISTORY

Beyond the decision of the director, the Petitioner has also not established that the Beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires twelve months of experience in the offered job of dentist. On the labor certification, the Beneficiary claims to qualify for the offered position based on experience working 36 hours per week as a dentist for the [redacted] in [redacted], Romania, from November 10, 1987, through October 20, 1999. However, the Beneficiary's resume that was submitted with the petition claims that the Beneficiary worked as a general dentist for the [redacted] from November 1987 until June 1995 and did not list any employment between 1995 and 2009. The Petitioner submitted an October 10, 2014, employment letter from [redacted] which states that the author was the director of the [redacted] Dental Clinic and directly supervised the Beneficiary's work as a dentist at [redacted] from November 1987 through April 1994. Meanwhile, the Petitioner also submitted an August 14, 2014, employment letter from [redacted] which states that [redacted] was the director of the [redacted] Dental Clinic and directly supervised the Beneficiary's work as a dentist at [redacted] from November 1987 through June 1995. The Petitioner did not offer any evidence to explain which doctor was the actual director of the [redacted] nor did the Petitioner submit evidence to clarify the discrepancy between the stated dates the Beneficiary was employed there. Doubt cast on any aspect of the Petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, at 591.

Furthermore, in conjunction with a previous immigrant petition filed on behalf of the Beneficiary on September 24, 2003, the previous petitioner submitted documentation claiming that the Beneficiary had worked for the [redacted] in [redacted], Romania, "as Director of Religious Education Department, for a period of eight years, from September 1987 to June 1995. [The Beneficiary] offered her services voluntarily, working 32 hours per week, with at least 5 hours a day, 6 days a week." The calculated distance from [redacted] to [redacted] is over 100 miles. The record does not demonstrate how the Beneficiary was able to work 36 hours per week in [redacted] while also volunteering six days per week more than 100 miles away in [redacted]. The record does not demonstrate how the Beneficiary was able to work 36 hours per week in [redacted] while also volunteering six days per week more than 100 miles away in [redacted]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence.

Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, at 591-592.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(g)(1). USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). This deficiency will not serve as a ground for dismissal of the appeal, but must be addressed in any further proceedings.

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of B-D-M-S-, Inc.*, ID# 14035 (AAO Nov. 13, 2015)